

## OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 96-2

February 23, 1996

TO : All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM : Fred Feinstein, General Counsel

SUBJECT: Representation Case Procedures

As set forth in my August 3, 1994 memorandum, one of our most significant operational priorities is that of promptly resolving questions concerning representation. That report established certain goals for the processing of representation cases. Regions were given wide latitude to implement procedures in order to meet these established goals. Since then, much experience has been gained in the field under these new guidelines and implementing procedures. Labor and management representatives testified concerning our representation procedures during the Board's Advisory Panel Meetings in March 1995. The Representation Rules Committee and the Field Managerial Performance Management Group made a number of additional recommendations in this area.

A Representation Case Study Report, prepared by a field committee which had reviewed all of these reports and our overall experience, was the subject of extended discussions at the Regional Directors Conference conducted in June 1995. The report proposed certain time targets, as well as certain procedures and techniques designed to improve our efficiency in this area. Many of the procedures suggested were a compendium of successful practices adopted by some Regions since the issuance of my August 3, 1994 report. Certain procedural changes were suggested with the goal of expediting the resolution of issues in post-election cases. A number of proposals seeking to eliminate the delays inherent in bifurcated procedures and consolidated proceedings were discussed at the Regional Directors Conference.

After considering all of the above reports and obtaining feedback from members of the staff and the public we serve, I have decided to implement the procedures described below effective immediately. While it would have been my desire to announce these changes sooner, a number of unforeseen events, including the government shutdowns, delayed the implementation of these procedural changes. As you know, many of these procedures have been in

place in a number of our Regional Offices for some time and have increased their effectiveness in this area. I believe that these procedures will enhance our ability to resolve questions concerning representation promptly, consistent with our statutory mission, and will provide field-wide uniformity and predictability in the processing of representation cases.

### **PROCEDURES FOR THE PROCESSING OF PRE-ELECTION CASES**

When an RC, RD or RM petition is filed, the case should be assigned the highest docketing priority. The parties should be notified of the petition and (anticipated) date of the hearing via facsimile transmission the same day that the petition is filed.<sup>1</sup> The Region will notify all parties of the date of the hearing by issuing a notice of hearing or notice of proposed hearing or by noting, in its opening correspondence, that a formal hearing, if necessary, will be held on a specified date.<sup>2</sup> Regions may take into account Regional and bar practices in determining which of these various methods will be used to notify the parties of the date of the hearing.<sup>3</sup>

The opening correspondence should reflect that the hearing will be conducted on consecutive days until it is completed, absent the most compelling circumstances, and that requests for postponement of a formal hearing will be granted only for good cause and consistent with the requirements set forth in Form NLRB 4338.<sup>4</sup> It should also indicate that, in light of our policy of processing these cases expeditiously, any party who wishes to be represented by counsel or other representative in the case should secure such promptly.

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<sup>1</sup> Virtually all employers and most unions now have fax machines. The petition form will be modified to provide a space to record fax numbers. In the rare situations in which a fax number is not available, overnight mail service may be utilized.

<sup>2</sup> If more practicable, the notice or correspondence faxed to notify the parties of the (anticipated) date of hearing, may provide for the location of the hearing to be designated at a later time.

<sup>3</sup> Where it is apparent, at the time of filing, based upon the petition or otherwise, that a dismissal is appropriate, a notice of hearing should not issue and the case should be dismissed, absent withdrawal.

<sup>4</sup> The postponement request should be in writing, set forth the basis in detail, suggest alternative dates, set forth the positions of all other parties and certify simultaneous service on the other parties. If these requirements are routinely adhered to, a great deal of Board agent time will be saved because the burden of getting alternative dates will be shifted to the parties.

The opening correspondence will contain the usual request for information from the employer, including an alphabetized list of employees in the petitioned unit and their classifications. In an effort to identify and seek to resolve as soon as possible issues of unit scope and composition which may arise in the case, the employer will also be encouraged to authorize the Agency to share the list with other parties to the case.

Consistent with our practice, the Board agent will promptly contact the parties to explore the issues raised by the petition. This prompt follow-up communication reinforces the goal of expeditious processing expressed in the faxed correspondence. The Board agent will discuss all of the critical issues with the parties and the likelihood of the parties' positions prevailing. If the initial phone contacts do not result in an election agreement and the notice of hearing has not issued with the service of the petition, it should ordinarily issue on the third or fourth workday after the petition's filing. The issuance of the notice of hearing should not be delayed beyond the third or fourth workday simply because an election agreement appears likely. In this regard, only if the agreement has been signed would the notice of hearing ordinarily not issue within that time frame.

If the issues that separate the parties appear to require a hearing, the Region should, where appropriate, conduct a conference, in person or by phone, for the purpose of further exploring the possibility of entering into an election agreement or narrowing the issues to be litigated at a hearing. The opening letter should alert the parties that a joint conference may be held for these purposes and emphasize that it is in the mutual interest of all parties, as well as the Agency, to explore fully all potential areas of agreement in order to eliminate or limit, to the extent possible, the significant costs associated with formal hearings.<sup>5</sup>

Maximum utilization should be made of fax transmissions in the negotiation of election agreement details. For instance, lists of employees, requests for postponements and the Region's responses, proposals for election agreements, etc., should all be transmitted by fax.

If a joint conference is to be held, it should be conducted before the actual date of the hearing, whenever possible. In this regard, parties may be more willing to explore ways in which issues can be resolved or narrowed before substantial time has been invested by them in preparing for the hearing. At this conference, the Board agent should explore all of the issues raised by the

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<sup>5</sup> A sample opening letter is attached for your convenience.

petition in an effort to obtain an election agreement. The parties should be encouraged to share information and documents at the conference. Again, the likelihood of the parties' positions prevailing should be discussed. If necessary, the appropriate supervisor and/or manager(s) should intervene. If an agreement is not possible, every effort should be made to narrow the issues that remain for the hearing. Where appropriate, the parties could be encouraged to execute written stipulations on the issues which are not in dispute, such as commerce, labor organization status, unit or eligibility, and these stipulations can either be read into the record or be introduced as exhibits during the hearing. The Board agent should also discuss with the parties the nature of the evidence to be presented and the order in which it will be elicited.

The conference should normally be held in the Regional Office if the parties are located within the greater metropolitan area (75 miles). If deemed appropriate, parties outside this area may also be encouraged to come to the office for a conference.<sup>6</sup> Otherwise, the joint conference will be conducted by phone and documents will be faxed, to the extent necessary. The conference can also be held at some other mutually convenient location.

If a conference is not held because of a party's inability or unwillingness to attend, the Board agent should attempt to conduct a conference prior to the opening of the hearing. At the hearing, attempts to obtain agreement will continue, as always, with appropriate supervisory and managerial assistance.

The hearing officer should have a meeting with the appropriate Regional management and/or supervisory personnel in advance of the hearing to discuss the issues that may be raised and develop a plan for the conduct of the hearing. If an agreement is not held before the hearing opens, the hearing officer will actively ensure that a complete and concise record is developed on all relevant issues.

On the first day of the hearing, the hearing officer will indicate that the parties can make arrangements with the reporting service contractor to obtain the transcript on an expedited basis.<sup>7</sup> The parties will be further notified, also on the record, that requests for an extension of time to file briefs based upon a delay

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<sup>6</sup> There are a number of advantages associated with conducting the conference in the Regional Office. Aside from the savings achieved in travel and time, the Regional Office has caucus space, research sources, ready supervisory guidance and an opportunity for managerial and supervisory intervention which may not be as readily available elsewhere.

<sup>7</sup> The parties can arrange to pick up the transcript or to have it delivered by messenger or overnight mail.

or the nonreceipt of transcripts will be denied if the party has not availed itself of this option. Regions may also provide a preprinted form to the parties notifying them of this policy. The Regional Director should specifically refer to the advance notice of this policy which was provided to the parties when denying a request for an extension of time to file a brief based on the unavailability or delayed receipt of transcripts.

Under the Board's rules, parties are entitled to 7 days to file briefs and the hearing officer has discretion to grant an extension of time for a period not to exceed 14 days (Section 102.67). Because of the need to resolve representation questions as expeditiously as possible, the hearing officer should exercise his or her discretion judiciously and grant requests for extensions of time beyond the initial 7 days in only in the most unusual cases.

Finally, in order to further expedite our processes, a Regional Director may approve a petitioner's oral request to withdraw a petition.

### **PROCEDURES APPLICABLE TO POST-ELECTION CASES**

If there are determinative challenges, the Region should initiate the normal challenge investigation while awaiting the expiration of the period for filing objections. Immediately after the period for filing objections has expired, the Region should notify the parties, by fax, of the (anticipated) date for the conduct of any hearing that may become necessary on the challenges and/or objections.<sup>8</sup> This notice can be provided through the issuance of a notice of (anticipated) hearing or be part of the Region's opening correspondence. If only objections have been filed, some Regions may prefer to provide such notice by letter and issue a notice of hearing, if necessary, after reviewing the evidence submitted. The hearing should be scheduled for the earliest practical date.

Within a few days of the receipt of evidence on the objections and/or determinative challenges, a determination should be made as to whether a hearing is likely to be necessary. Potential ways in which the issues could be resolved should be discussed at that time. For example, the resolution of certain challenges by agreement may eliminate the need to resolve others and/or render objections moot. All such avenues should be thoroughly explored.

In order to maximize the Region's flexibility to resolve the issues raised by the objections and challenges, a Regional Director is now authorized to approve

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<sup>8</sup> As in pre-election cases, if a fax is not available such notice can be provided by overnight mail.

a party's request to withdraw or sustain challenge(s), with the other parties' acquiescence, without having to resolve the issue definitively through a factual stipulation.<sup>9</sup> In this regard, a labor organization and employer may desire an early resolution of the issues, rather than await the results of our investigation, as long as they are not locked into a position on the issues if a second election is directed or agreed upon. However, the Regional Director should not approve any such request where it is clearly contrary to the facts independently known by the Region.

Where it appears that the objections are likely to be deemed meritorious after a hearing, the Region may also, in an effort to obtain an informal resolution of these issues, advise the party which allegedly engaged in objectionable conduct that the Lufkin language set forth in CHM 11452.1 will be included in a notice of second election if the election is set aside following the close of a hearing, but will not be included if the election is set aside pursuant to an all-party stipulation.

To further expedite matters, approval of oral requests to withdraw objections is hereby authorized.

Where the initial efforts to resolve the issues are not successful and the parties' submissions appear to raise factual or legal issues requiring a hearing, no investigation should be conducted and a report should issue setting the objections and/or challenges for hearing as expeditiously as possible. The Region should be guided by the need for expeditious processing in determining whether the hearing officer's recommendations should be submitted to the Board or to the Regional Director.

Significant delays have been experienced in situations in which it is determined that some objections should be overruled and others raise substantial and material issues requiring a hearing. The normal practice in these situations has been to issue a report recommending that some of the objections be overruled and to await the Board's ruling on any request for review or exceptions filed in response to that report before scheduling the remaining objections for a hearing. Regions are now authorized to issue a report on those objections which can be administratively disposed of and conduct a hearing on the objections which raise substantial and material issues, notwithstanding the pendency of a request for review or exceptions to the initial report. Regions

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<sup>9</sup> See CHM 11366. See, also, Fred Wilkinson Associates, Inc., 297 NLRB 737 (1990), at fn. 2, in which the Board held that a party may withdraw a challenge and upon the Regional Director's approval, the ballot may be opened and counted.

should keep the Executive Secretary's Office apprised of the progress of the hearing and when the hearing officer's report is transmitted to the Board, it should refer to the prior report issued in the case. Alternatively, Regions may issue a report sending those objections which raise substantial and material issues to a hearing and note in that report that the objections which are not being noticed for hearing will be retained for further appropriate processing. The report on the objections which did not require a hearing should issue, at the very latest, at or about the time the hearing officer's report issues. The delays inherent in the previously used bifurcated proceeding should be eliminated in virtually all cases under either of these two approaches.<sup>10</sup> Regional Directors should obviously send objections to a hearing if there is a real possibility that an administrative resolution of those issues will result in a remand.

As in the pre-election stage, postponements of post-election hearings should not be granted, absent good cause, and such hearings should be held on consecutive days until completed. Postponement requests should be subject to the requirements set forth in Form NLRB 4338 and the correspondence sent to the parties should reflect these requirements.

Post-hearing briefs should not be allowed unless the hearing officer concludes that they will be helpful. Where allowed, the hearing officer may limit briefs to those factual or legal issues where briefing would be helpful. Additionally, parties should be advised that requests for extensions of time to file briefs will not be granted except under the most unusual circumstances. As in the pre-election area, the hearing officer should advise the parties, at the opening of the hearing, that requests for extensions of time to file briefs based upon the unavailability or delayed receipt of transcripts will not be entertained unless arrangements have been made for the expedited delivery of transcripts.

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<sup>10</sup> There may also be circumstances in which it may be appropriate to do this in the context of determinative challenges.

## **ALTERNATIVE PROCEDURE FOR CONSOLIDATED CASES**

Pursuant to Memorandum GC 94-17, hearings on consolidated unfair labor practices and post-election issues are being scheduled to be heard within 28 days of the issuance of the complaint. There may be some circumstances in which it may be appropriate and more expeditious to hold the unfair labor practice case in abeyance and conduct a hearing on the objections and/or challenges. This alternative procedure could be used where the unfair labor practice allegations and objections are coextensive and the outcome of the representation case will, after Board review, likely provide an appropriate basis for resolving the unfair labor practice case.<sup>11</sup> Thus, if the objections are overruled after a hearing, either as a result of credibility findings or as a matter of law, the representation proceeding could provide an objective record or a persuasive rationale for the administrative dismissal of the unfair labor practice charge which was being held in abeyance. Or, if the objections are sustained after a hearing and the sole remedy for the unfair labor practices consists of the posting of a notice, such as is the case with 8(a)(1) or 8(b)(1)(A) statements or conduct, the Regional Director will determine whether the coextensive charge should be dismissed, consistent with the standards set forth for the exercise of prosecutorial discretion in Memorandum GC 95-15, *Lightening the Regional Office Workload*, at page 7. A dismissal would be appropriate where provision has been made for a Lufkin notice and that notice, coupled with the rerun election, will, in essence, provide an effective remedy for the unfair labor practice allegations. If, on the other hand, after reviewing the record evidence, the Regional Director is no longer of the opinion that dismissal of the charge would be appropriate, a complaint should issue and a second election should not be conducted in the absence of a request to proceed.

The situations described in this memorandum may not be exhaustive and there may be other circumstances in which this alternative procedure may be appropriate. However, this procedure should not be used where the likelihood of duplicative proceedings is high and the representation case will not provide a suitable remedy for the unfair labor practice allegations, e.g., where restoration of the status quo ante is required. It also cannot be utilized where a finding of an unfair labor practice is required in order to resolve the objection or challenge, such as is the case with an allegation of an 8(a)(3) discharge.<sup>12</sup> Regions are

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<sup>11</sup> This, of course, assumes that after discussion with the Board agent, the objecting/charging party continues to wish to proceed with both the objections and charge, rather than withdraw the charge to allow the objections to be processed more expeditiously.

<sup>12</sup> See, Texas Meat Packers, Inc., 130 NLRB 279 (1961), and its progeny.

nevertheless encouraged to consider this alternative procedure in appropriate cases and particularly in connection with the situations described in the preceding paragraph. The parties' positions should be considered, but will not be controlling, in determining whether this alternative procedure should be used in a particular situation.

Because we want to evaluate the effectiveness of this approach, Regional Directors should consult with their respective AGC before they decide to utilize it and should report their experiences under this alternative procedure to their AGC.

### **CONCLUSION**

In closing, your input was very important to me in deciding which of the many valuable recommendations made by individual members of the staff and the various groups which studied these issues should be implemented at this time. The process of reevaluating our time goals and the overall effectiveness of our procedures is, nevertheless, continuing. We should continue to strive to hold elections between 6 to 7 weeks from the date of filing in all but the most unusual cases. Moreover, we are exploring the establishment of appropriate time goals for other stages of the representation case process. The Board is also considering procedural changes which will help expedite the resolution of questions concerning representation. I hope we will be able to discuss the results of this process with you soon. As always, your views will be an integral part of my ongoing review of these issues. I encourage you to give some thought to these matters and welcome any suggestions you may have in this regard.

F. F.

Attachment

cc: NLRBU

**SAMPLE PRE-ELECTION LETTER**

Dear Sir or Madam:

Enclosed is a copy of a Petition for Certification of Representative, pursuant to the provisions of the National Labor Relations Act, which has been filed with this office. Also enclosed is a copy of "Parties Involved In a Representation Petition," Form NLRB-4812, explaining the manner in which representation petitions are processed by this Agency.

The National Labor Relations Act requires the prompt resolution of questions concerning representation. Because this is an integral part of our mission, these cases are prioritized and resolved as expeditiously as possible.

If the Board has jurisdiction, the parties may execute a standard agreement for an election fixing the date, time and place and the classifications to be included in the appropriate unit. All such elections are conducted by an agent of the Board. Election procedures are outlined in the enclosed pamphlet. In the event there is no agreement for an election, a formal investigatory hearing may be held before a hearing officer of the Board.

Consistent with the Agency's efforts to ensure the expeditious resolution of questions concerning representation, please be advised that in the event it is determined that a formal investigatory hearing is necessary it is our intention to conduct that hearing on \_\_\_\_\_. Requests for the postponement of the hearing will be granted only for good cause and consistent with the requirements set forth in Form NLRB 4338, which is enclosed with this letter. For purposes of Section 102.114(d) of the Board's Rules and Regulations, I am granting advance permission to the parties to file postponement requests with me by facsimile transmission. The hearing, once commenced, will be conducted on consecutive days, until completed, unless the most compelling circumstances warrant otherwise. I advise the parties of these requirements at this time so that they may begin their preparations for them.

Attention is called to your right, and the right of any party, to be represented by counsel or another representative in any proceeding before the National Labor Relations Board. In the event you choose to have a representative appear on your behalf, please have your representative complete "Notice of Appearance," Form NLRB-4701. If you desire to designate a representative to receive all documents mailed by this office in this matter, you are requested to complete "Notice of Designation of Representative as Agent for Service of Documents," Form NLRB-4813. Both forms should be returned to this office as soon as possible. In view of our policy of processing these cases expeditiously, I anticipate that in the event you exercise your right to be represented by counsel or another representative you will do so promptly.

Prior to conducting a formal hearing, the staff member named below, who has been assigned to this matter, will be in contact with the parties to explore the issues and, if appropriate, to obtain an election agreement. If these contacts do not result in an election agreement, we may conduct an informal conference before the scheduled formal hearing. At this conference, the Board agent will explore all of the issues raised by the petition in an effort either to obtain an election agreement or narrow the issues which will be litigated at the hearing. It has been our experience that these informal conferences can be extremely useful in helping us in these regards, and that it is in the mutual interest of all parties, as well as the Agency, to explore fully all potential areas of agreement in order to eliminate or limit, to the extent possible, the significant costs associated with litigation. I encourage the parties to share all available information at this conference.

In order to assist us in our investigation, please submit the following information immediately:

1. Commerce information, which may be furnished on the enclosed "Questionnaire on Commerce Information," Form NLRB-5081. An extra copy of the form is enclosed for your files.
2. An alphabetized list of employees described in the petition together with their job classifications, for the payroll period immediately preceding the date of this letter. This list is to be used to resolve possible eligibility and unit questions as well as to determine the adequacy of the Petitioner's showing of interest.

3. Copies of correspondence and existing or recently expired contracts, if any, covering employees in the unit alleged in the petition. Names of any other labor organization(s) claiming to represent any of the employees in the proposed unit.
4. Your position as to the appropriateness of the unit.

It has been our experience that the exchange of information made possible by providing the list of employees requested in paragraph 2 above to all parties to the case is an excellent aid in resolving many of the eligibility and unit questions that arise during case processing. Accordingly, I encourage you both to provide the list as requested in paragraph 2, and to permit me to provide the list to the other parties. Please state in your return correspondence whether you intend to provide the list and whether I may provide it to the other parties.

Please be advised that in addition to the list of employees requested in paragraph 2 above, in the event an election is agreed to or directed in this case, a list of the full names and addresses of all the eligible voters must be filed by the employer with the undersigned, who will in turn make it available to all parties to the case. The list must be furnished to the undersigned within seven (7) days of the direction of election or approval of an agreement to conduct an election. I am advising you now of this requirement so that you have ample time to prepare for the eventuality that such list may become necessary.

It has been our experience that by the time a petition such as this one has been filed, employees may also have questions about what is going on and what may happen. At this stage in the handling of this case, we, of course, do not know what disposition will be made of the petition, but experience tells us that an explanation of rights, responsibilities and Board procedures can be helpful to your employees. The Board believes that employees should have readily available to them information about their rights and the proper conduct of employee representation elections. At the same time, employers and labor organizations should be apprised of their responsibilities to refrain from conduct which could impede employees' freedom of choice. Accordingly, you are requested to post the enclosed Notice to Employees in conspicuous places in areas where employees such as those described in the enclosed petition work. Please advise me where in your facility you have posted the notice. Copies of this notice are also being made available to the labor organization(s) involved. In the event an election is not conducted, pursuant to this petition, you are requested to remove

the posted notice. In addition, I am enclosing two (2) copies of the pamphlet, "Your Government Conducts an Election," for distribution to employees and to supervisory personnel. Additional copies of the pamphlet will be furnished upon request.

Please be further advised that under the Freedom of Information Act, unfair labor practice charges and representation petitions are subject to prompt disclosure to members of the public upon request. In this regard, you may have received or may receive a solicitation by organizations or persons who have obtained public information concerning this matter and who seek to represent you before our Agency. You may be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board; their information regarding this matter is only that which must be made available to any member of the public.

N.B. Effective August 5, 1987, Section 103.20 of the Board's Rules and Regulations was amended. A copy of the amended Section is enclosed.

Investigation of this matter has been assigned to the staff member named below. If you have any questions, do not hesitate to communicate with the Board agent. Your cooperation in this matter will be appreciated.

Very truly yours,

Regional Director

Enclosures

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Board Agent: \_\_\_\_\_ Telephone No.: \_\_\_\_\_